No. 08-71

Supreme Court U.S.
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IN THE

Supreme Court of the United States

MACKENTOCH SAINTHA,

Petitioner,

—v.—

MICHAEL B. MUKASEY,
UNITED STATES ATTORNEY GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. THE FOURTH CIRCUIT ERRED 1

II. THERE IS A DEEP CIRCUIT SPLIT 6

III. PETITIONER'S MERITS CLAIM IS SUBSTANTIAL 12

IV. THIS CASE PRESENTS AN IDEAL VEHICLE 12

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Azuakoemu v. Attorney General,
195 Fed. Appx. 47 (3d Cir. 2006) 10

Badewa v. Attorney General,
252 Fed. Appx. 473 (3d Cir. 2007) 10

Boakai v. Gonzales,
447 F.3d 1 (1st Cir. 2006) 11

Boumediene v. Bush,
128 S.Ct. 2229 (2008) 6

DeAlmeida v. Attorney General,
240 Fed. Appx. 963 (3d Cir. 2007) 10

Gelaneh v. Ashcroft,
153 Fed. Appx. 881 (3d Cir. 2005) 10

Hana v. Gonzales,
503 F.3d 39 (1st Cir. 2007) 8

Hanan v. Gonzales,
449 F.3d 834 (8th Cir. 2006) 11

Hamid v. Gonzales,
417 F.3d 642 (7th Cir. 2005) 11

Hussein v. Attorney General,
273 Fed. Appx. 147 (3d Cir. 2008) 10

INS v. St. Cyr,
533 U.S. 289 (2001) 6

Jean v. Gonzales,
435 F.3d 475 (4th Cir. 2006) 7

Jean-Pierre v. United States Attorney General,
500 F.3d 1315 (11th Cir. 2007) 8, 9

Kamara v. Attorney General,
420 F.3d 202 (3d Cir. 2005) 10

Leon-Oveido v. Attorney General,
182 Fed. Appx. 130 (3d Cir. 2006) 10

Matter of A-S-B-,
24 I & N Dec. 493 (2008) 3

Matter of V-K-,
24 I. & N. Dec. 500 (2008) 3

Momoh v. Attorney General,
190 Fed. Appx. 159 (3d Cir. 2006) 10

Neyor v. Attorney General,
256 Fed. Appx. 473 (3d Cir. 2007) 10

Ornelas v. United States,
517 U.S. 690 (1996) 1, 2, 3, 5

Pierre v. Gonzales,
502 F.3d 109 (2d Cir. 2007) 8, 9

Pullman-Standard v. Swint,
456 U.S. 273 (1982) 1, 3, 8, 9

Ramadan v. Gonzales,
479 F.3d 646 (9th Cir. 2007)
(per curiam) 6, 8, 11

Rangolan v. Mukasey
128 S.Ct. 2934 (2008) 12

Singh v. Gonzales,
351 F.3d 435 (9th Cir. 2003) 11

Thompson v. Keohane,
516 U.S. 99 (1995) 5

Wang v. Ashcroft
320 F.3d 130 (2d Cir. 2003) 9

Xiao Ji Chen v. U.S. Dep't of Justice,
471 F.3d 315 (2d Cir. 2006) 6, 9

Statutes

8 U.S.C. 1252(a)(2)(C) 11

8 U.S.C. 1252(a)(2)(D) ..... 6, *passim*

Miscellaneous

Brief for the United States,
No. 95-5257, 1996 WL 32774, in
Ornelas v. United States,
517 U.S. 690 (1996) 2

I. THE FOURTH CIRCUIT ERRED.

1. The critical point in this case is that petitioner does not challenge the underlying historical facts found by the IJ. Rather, petitioner contends that, on these historical facts, he satisfied the legal test for "acquiescence." Petitioner is thus raising a traditional claim involving the application of law to fact: "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard." *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982).

The government nonetheless asserts that the facts *are* in dispute and that petitioner is seeking judicial review of those facts. But, notably, the government does not contend that petitioner is seeking review of the underlying *historical* facts. Rather, the government states: "The question whether petitioner has established as a matter of fact that it is more likely than not that he would be tortured with the acquiescence of the Haitian government is not undisputed." BIO 11.

The government (like the Fourth Circuit) has simply re-labeled the ultimate legal conclusion – whether the Haitian government will acquiesce in petitioner's likely torture – as a factual claim. But that type of re-characterizing would transform every application claim into a factual claim.

Thus, for example, in *Ornelas v. United States*, 517 U.S. 690, 697 (1996), the Court held that

whether probable cause is satisfied on the historical facts of a case is a legal question. Under the government's approach, however, that claim could also be re-labeled simply by stating that the defendant disputes, as a factual matter, whether probable cause was satisfied.

The government also states that the "BIA concluded that petitioner had not adduced sufficient evidence to support such a finding [of acquiescence], and petitioner disputed that determination on judicial review." BIO 11. The government argues, therefore, that petitioner is simply asking the court to "give more weight to his evidence than the agency did . . . ." BIO 9.

But the BIA's reversal of the IJ ruling did not turn on a disagreement over the underlying *historical* facts. The BIA stated explicitly that it found "no clear error in the Immigration Judge's findings of fact." Pet. App. 29a n.1. Significantly, the government does not even address this statement.

The BIA thus held only that there were insufficient historical facts to satisfy the legal standard of acquiescence. As the government itself made clear in its *Ornelas* brief, that is not a factual claim: "courts must decide as a matter of law whether the facts supply the *requisite quantum* of suspicion" to satisfy probable cause. Brief for the United States, No. 95-5257, 1996 WL 32774, at *18.

Moreover, the BIA has specifically held that these types of claims are *not* factual claims. Pet. 27-29 (citing *Matter of V-K-* and *Matter of A-S-B-*). The government argues (at 13-15) that the agency and courts can have different review standards, but that misses the point. The claim in this case cannot be labeled factual if the same claim would be deemed non-factual under BIA precedent.

2. The government also contends that petitioner's claim is unreviewable because it involves a "well-settled, uncontested legal standard." BIO 9. But that is the very definition of an application claim: whether the historical facts satisfy an "undisputed" legal standard. *Pullman-Standard*, 456 U.S. at 289 n.19.

Legal standards will often be settled at only the most general level and will thus "acquire content only through application" to concrete factual settings. *Ornelas*, 517 U.S. at 697. In *Ornelas*, for instance, the legal standard for warrantless searches was well settled ("reasonable suspicion" or "probable cause"). The Court emphasized, however, that it was "not possible" to articulate "precisely" what was meant by those standards, *id.* at 695, and held that "[i]ndependent review" of individual fact patterns was thus necessary "to clarify" the "legal principles." *Id.* at 697.

Here also, the legal standard is settled only at the most general level – the CAT applicant must show governmental "acquiescence." Pet. App. 36a. Yet as this case illustrates, those terms have little

meaning in the abstract, and indeed, resulted in divergent rulings from the IJ and BIA, despite agreement on the historical facts.

The IJ noted that "the government of Haiti would be well-aware of respondent's return and most likely of his potential vulnerability" and that the government "makes virtually no effort to protect the human rights" of those like petitioner. Pet. App. 48a. Critically, moreover, the IJ did not find merely that the Haitian government is powerless to prevent torture or was only *generally* aware of political violence in Haiti. The IJ found that the Haitian government "would be well-aware of the *specific* potential for torture" petitioner will face. *Id.* at 48a-49a (emphasis supplied).

On these historical facts, the IJ properly concluded that petitioner had satisfied the definition of "acquiescence." Pet. App. 49a. The BIA reversed with virtually no explanation, yet it is difficult to see what the general term "acquiescence" could mean if it is not satisfied in a case where (1) the government will be aware of the petitioner's return to the country and the "specific potential for torture" he will likely face from political opponents, (2) the government makes "little or no effort" to protect those like petitioner, and (3) there is no suggestion that the Haitian government cannot prevent the torture if it chooses.[1]

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[1] As noted, the BIA expressly agreed with the IJ that petitioner was more likely than not to be tortured (Pet. App.

Furthermore, although the government repeatedly emphasizes that petitioner's claim is "fact-based" (BIO 9), the claim here is far less fact-specific than many claims this Court treats as legal claims. *See, e.g., Ornelas*, 517 U.S. at 698 (emphasizing that "one determination will seldom be a useful precedent for another" in the probable cause area) (quotation marks and citations omitted). Here, there will frequently be similar factual patterns because the cases concern policies at the governmental level.

In addition, unlike in cases such as *Ornelas*, 517 U.S. 690, and *Thompson v. Keohane*, 516 U.S. 99 (1995), the question here does not simply concern the level of appellate review, but whether there will be *any* judicial review. In the absence of any review, the BIA can continue to routinely (and cryptically) deny CAT claims, simply by asserting that the petitioner's historical facts do not amount to acquiescence.

32a-36a), and disagreed only with the IJ's acquiescence determination. Insofar as the BIA offered any explanation for that disagreement in its acquiescence discussion at the conclusion of its opinion, it stated only that "it seems just as likely that the [petitioner's] family would be able to manipulate the system in order to . . . insure that he is not tortured." Pet. App. 37a-38a. But CAT's drafters could not conceivably have meant that a government does not acquiesce in torture if it can be manipulated to prevent the torture. If anything, the BIA's statement reinforces that the Haitian government is not incapable of preventing torture if it *chooses* to do so.

3. The government argues that *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), does not support petitioner because it was decided under a different statute dealing with enemy combatants. BIO 10 n.2. But, if anything, the enemy combatant context was viewed by the government as more controversial.

The government dismisses *INS v. St. Cyr*, 533 U.S. 289 (2001), as dicta. But while *St. Cyr* ultimately was decided on statutory grounds, the interpretation of the statute was driven largely by Suspension Clause concerns grounded in the Court's historical habeas analysis. 533 U.S. 299-303. The government also argues (at 10-11 n.2) that *St. Cyr* did not "clarify what it meant by the term 'application.'" Even if that were true, it is a reason for *granting* review, especially given the number of courts that have relied heavily on that language. *See, e.g., Ramadan v. Gonzales*, 479 F.3d 646, 652 (9th Cir. 2007) (per curiam); *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 327 (2d Cir. 2006).[2]

II. THERE IS A DEEP CIRCUIT SPLIT.

1. The government does not dispute that only three courts of appeals (the Sixth, Seventh and Tenth Circuits) have held that Section 1252(a)(2)(D)

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[2] The government contends (at 10 n.2) that the constitutional right to review was waived below, but petitioner expressly discussed *St. Cyr* and the history of immigration habeas. *See* Pet's. Reply Br. at 5-6. In any event, the constitutional right to review can and must be considered as part of the statutory analysis. *St. Cyr*, 533 U.S at 299-300 (relying on constitutional avoidance canon).

is limited to pure legal claims, while at least six others (the Second, Third, Fourth, Eighth, Ninth and Eleventh) have squarely held that Section 1252(a)(2)(D) covers claims involving the application of law to fact. Pet. 18-19. The government contends, however, that this threshold question is not presented here because the Fourth Circuit refused to "weigh in on that issue" and held only that petitioner's claim was unreviewable because it presented a factual question. BIO 13.

But the Fourth Circuit had previously decided the issue in a published opinion. *See Jean v. Gonzales*, 435 F.3d 475, 482 (4th Cir. 2006) (holding that the "application of law to factual findings" is reviewable under Section 1252(a)(2)(D)); Pet. 17 (citing *Jean*). The fact that the Fourth Circuit in this case failed to acknowledge *Jean* (at Pet. App. 12a n.4) is of no consequence, since there is no dispute that *Jean* is the law in that Circuit.

More fundamentally, the Court will first need to construe Section 1252(a)(2)(D) to determine what types of legal claims are reviewable before it can decide whether petitioner's particular claim falls within the statute. The government has offered no reason why this Court would decide whether a claim is factual or legal in a vacuum, without relation to what Congress meant by the term "questions of law."

2. The government also does not dispute that, outside of the CAT context, the courts of appeals have reached different results in determining when a claim is "factual." The government argues, however,

that those cases are irrelevant because the jurisdictional inquiry turns on the "particular type of claim at issue." BIO 13. But Section 1252(a)(2)(D) is a generally-applicable jurisdictional provision. As a result, the analytical disagreements in the courts of appeals cannot be confined to a particular set of claims.

Indeed, the flaw in the government's argument, and the Fourth Circuit's decision, is identical to that in non-CAT cases – the failure to distinguish between historical facts and application claims. *Compare Ramadan* 479 F.3d at 656-57 (relying on *Pullman-Standard* and holding that it could review whether the historical facts were sufficient to satisfy the statutory standard for filing an untimely asylum application), *with Hana v. Gonzales*, 503 F.3d 39, 42-43 (1st Cir. 2007) (concluding that alien's claim that his depression and nervous breakdown amounted to "extraordinary circumstances" excusing his late filing was not a reviewable question of law). *See generally* Pet. 18-27.

3. In the CAT context, the government notably does not dispute that the Second, Third, Ninth and Eleventh Circuits have all held that they may review the "application of law to fact." *See* Pet. 21-23 (discussing CAT cases). The government offers a variety of reasons, however, why the law in these circuits should be ignored.

(a) The government contends (at 12) that *Jean-Pierre v. United States Attorney General*, 500 F.3d 1315, 1322 (11th Cir. 2007), and *Pierre v.*

Gonzales, 502 F.3d 109, 113-114 (2d Cir. 2007), are distinguishable because they involved a "dispute about the legal definition of 'torture.'" But those cases were conceptually identical to petitioner's case.

In *Jean-Pierre*, as in this case, the legal standard was settled: under the governing regulations, torture is the infliction of "severe" pain and suffering. The historical facts were also settled – Haiti engages in such practices as "kalot marassa" (severe boxing of the ears). The question was thus whether kalot marassa constituted "severe" pain and suffering. The Court reviewed the question, stressing that Section 1252(a)(2)(D) covers "the application of law to fact." 500 F.3d at 1321 (citing *Pullman-Standard*). Similarly, in *Pierre*, the Second Circuit stated that it could not review the BIA's "factual findings" (such as those about the "prevailing conditions" in Haiti), but made clear that it could review the BIA's "application of the definition of torture to its factual findings . . . ." 502 F.3d at 121.[3]

The government notably avoids stating whether it believes *Pierre* and *Jean-Pierre* involved "pure" legal claims or, rather, "application" claims

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[3] The Second Circuit, moreover, has pre-REAL ID CAT precedent. *Wang v. Ashcroft*, 320 F.3d 130, 143 (2d Cir. 2003). The government dismisses *Wang* because it predated the enactment of Section 1252(a)(2)(D), BIO 12, but does not contest the overarching point that Section 1252(a)(2)(D) was intended to retain the scope of review previously afforded in habeas. *Chen*, 471 F.3d at 326-27, 330 n.8; *id.* at 331 n.10 (citing *Wang* approvingly).

that nonetheless fell within Section 1252(a)(2)(D). If the former, the government has not explained why the cases are conceptually different from petitioner's case. If the latter, the government has offered no basis for distinguishing between reviewable and unreviewable *application* claims.

(b) The government dismisses (at 13) the Third Circuit's decisions in *Badewa* and *DeAlmeida* because they were unpublished, but does not dispute that they involved the type of claim petitioner raises here. The Third Circuit, however, has issued several published CAT cases explicitly holding that the "application of law to fact" may be reviewed under Section 1252(a)(2)(D). *See, e.g., Kamara v. Attorney General*, 420 F.3d 202, 211 (3d Cir. 2005). Accordingly, the Third Circuit now *routinely* reviews CAT application claims, without the need for additional published decisions, citing where necessary to its lead decision in *Kamara*.[4] In short, there is no question that petitioner would have received judicial review of his claim in the Third Circuit.

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[4] *See, e.g., Leon-Oveido v. Attorney General*, 182 Fed. Appx. 130, 133 (3d Cir. 2006) (citing *Kamara*, and reviewing the BIA's decision that petitioner's evidence was "insufficient to demonstrate that it is more likely than not" that he will be subject to torture); *Hussein v. Attorney General*, 273 Fed. Appx. 147, 154 (3d Cir. 2008) (same); *Neyor v. Attorney General*, 256 Fed. Appx. 473, 477 (3d Cir. 2007) (same); *Momoh v. Attorney General*, 190 Fed. Appx. 159, 163 (3d Cir. 2006) (same); *Gelaneh v. Ashcroft*, 153 Fed. Appx. 881, 885 (3d Cir. 2005) (same). *See also Azuakoemu v. Attorney General*, 195 Fed. Appx. 47, 52 (3d Cir. 2006).

The government also dismisses petitioner's Ninth Circuit cases, but, again, does not dispute that petitioner would have received review of his claim in that Circuit. Rather, the government dismisses the Ninth Circuit's cases on the ground that those cases did not hinge on an interpretation of Section 1252(a)(2)(D), but instead held that the bar on review for criminal aliens (8 U.S.C. 1252(a)(2)(C)) was inapplicable to CAT claims. BIO 12.

The fact that the Ninth Circuit's analysis differs from that adopted by other courts is not a reason to deny review; this Court reviews and reconciles divergent results, not analytical approaches. Indeed, even if this case were not about a generally-applicable jurisdictional provision, and were solely about review of CAT cases, this Court's review would be warranted to address the split given the life and death stakes in CAT cases.[5]

Finally, the government cites cases from the First, Seventh and Eighth Circuits, BIO 11-12 (citing *Hanan*, *Boakai*, and *Hamid*), but those cases are too cryptic to know whether the petitioners were challenging the application of the torture standard to the historical facts. Insofar as the claims are decipherable in *Hanan*, the petitioner clearly

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[5] Given the Ninth Circuit's analysis in *Ramadan*, it is clear in any event that the Ninth Circuit would review CAT claims like petitioner's claim, even if it found that the bar on review did apply to CAT cases. *See also Singh v. Gonzales*, 351 F.3d 435 (9th Cir. 2003).

appears to be challenging historical facts, such as the level of "control" exercised by coalition forces in Afghanistan. 449 F.3d at 834, 836-37.

III. PETITIONER'S MERITS CLAIM IS SUBSTANTIAL.

The Fourth Circuit stated in a footnote (Pet. App. 17a n.7) that petitioner's claim would likely not have succeeded under the "substantial evidence" test. But the whole point of this case is whether petitioner was actually raising a factual claim, and the government has offered no reason why the Fourth Circuit would use the substantial evidence test on remand if the Court concluded that petitioner had raised a reviewable *legal* claim.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE.

First, unlike virtually every other Board case, the BIA stated explicitly in this case (Pet. App. 29a n.1) that it agreed with the IJ's findings of historical fact. Thus, this case squarely presents the question that arises in literally hundreds of circuit cases: whether the petitioner satisfied the statutory standard on the historical facts of the case;[6]

Second, because CAT is mandatory, the separate jurisdictional bar on discretionary claims is

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[6] The government notes (at 8) that the Court denied review in *Rangolan*, but the government's opposition there emphasized that the court of appeals had not issued an opinion in the case and there was no Fourth Circuit CAT precedent at the time. BIO at 9, 14.

inapplicable. Consequently, this case provides a clean vehicle for deciding the scope of Section 1252(a)(2)(D);

Finally, the issue over which petitioner seeks review is determinative of his CAT claim. The IJ and BIA both agreed that petitioner would more likely than not be tortured; indeed, both noted that his stepfather had recently been forced to flee Haiti and that his grandmother was literally burned alive. The only disagreement was whether petitioner's facts satisfied the legal standard for acquiescence – the claim over which petitioner seeks review.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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